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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 203

MRS. IDA ROSSER BARBER,

Petitioner,

vs.

LEGH R. POWELL, JR., AND H. W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

L. R. VARSER,
O. L. HENRY,
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BRIEF FOR LEGH R. POWELL, JR., AND H. W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, IN OPPOSITION.

Opinions Below.

Barber v. *Powell, et al.*, Receivers, rendered by Hayes, District Judge, filed November 24, 1942, denying motion to remand, printed in Record page 2, and in appendix to brief in Circuit Court of Appeals.

Barber v. *Powell,* Receivers, rendered by United States Circuit Court of Appeals for the Fourth Circuit, 8 May

1943, affirming the District Court, opinion by Dobie, Judge, *135* Fed. (2), 728.

Jurisdiction.

Jurisdiction is invoked under 28 U. S. C. A., 347, Section 24 (a), U. S. Judicial Code.

Question Presented.

The only question presented is whether Judicial Code 66, U. S. C. A. Title 28, Section 125, prevents the removal of a suit from the State Court to the Federal Court on the ground of diversity of citizenship, the requisite jurisdictional amount admittedly involved, when the defendants who sought removal are Federal receivers.

Statutes Involved.

Judicial Code, Section 66, 28 USCA, Section 125.
Judicial Code, Section 28, 28 USCA, Section 71.

Statement.

The facts are admitted, as follows:

1. That the requisite diversity of citizenship exists.

2. That jurisdictional amount is alleged.

3. The defendants' petition to remove, notice and bond on removal were all in due and proper form and timely filed, and that the allegations of fact in the petition are true.

4. That the defendants were appointed Receivers of the Seaboard Air Line Railway Company by the United States District Court for the Eastern District of Virginia, sitting at Norfolk, and are operating the properties of the Seaboard Air Line Railway Company as Receivers under this appointment.

In addition to these admissions the record shows that this action was instituted in the Superior Court of Lee County against the defendants to recover $5250.00 on account of property and personal damages growing out of a collision between the plaintiff and a passenger train operated by the defendants through the Town of Sanford, North Carolina.

The petition for removal with requisite notice and bond were filed in the Superior Court for Lee County, North Carolina, denied by the Clerk, allowed by the Judge, and on appeal to the Supreme Court of North Carolina, the order of removal was affirmed.

Barber v. *Powell,* 222 N. C., 133.

While the appeal of the petitioner was pending in the State Court, and within thirty days, the defendants filed a certified copy of the record with the District Court of the United States for the Middle District of North Carolina. After the affirmance of the order of removal by the Supreme Court of North Carolina, plaintiff made a motion in the District Court to remand to the State Court, and this motion was denied, which appears in the opinion of Hayes, District Judge, which is in the record (p. —).

Later, the District Court dismissed this action for want of prosecution, and the plaintiff appealed to the Circuit Court of Appeals for the Fourth Circuit. This appeal resulted in an affirmance of the District Court's order.

Argument.

Petitioner rests his contention upon the sole ground that Title 28, U. S. C. A., Section 125 sustains his contention and prevents removal.

The respondents contend that 28 U. S. C. A., Section 125, does not prevent removal by Federal Receivers on the ground of diversity of citizenship when the requisite facts appear.

The respondents' contention is supported by the opinion of District Judge Hayes, as appears in the record (p. —).

Barber v. *Powell,* 135 F. (2d) 728;
Barber v. *Powell,* 222 N. C., 133.
And the wealth of authorities cited in these opinions.

Counsel and the several courts that have considered this case have been able to find no authority supporting petitioner's contention. There is no conflict of authority on this question. The authorities cited by petitioner do not support petitioner's contention. Petitioner's contention seeks to work the repeal of so much of United States Judicial Code, Section 28, 28 U. S. C. A. Section 71, as provides for removal on the ground of diversity of citizenship as to receivers appointed by any Federal Court.

Conclusion.

The decision of the Circuit Court of Appeals of the Fourth Circuit is plainly right. It gives full play to both statutes and does not decree a repeal by implication.

The petition for writ of certiorari should be denied.

Respectfully submitted,
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